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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 226

GABBS EXPLORATION COMPANY, *Petitioner*,

v.

STEWART L. UDALL, Secretary of the Interior.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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GABBS EXPLORATION COMPANY, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on February 14, 1963.

OPINIONS BELOW

The opinion of the Deputy Solicitor of the Department of the Interior rejecting petitioner's application for a patent in respect of its Sibbald-Coral claims (JA 17-38)[1] is

[1] "JA" refers to the Joint Appendix printed for the court below, nine additional copies of which have been furnished pursuant to Rule 21(4).

reported at 67 I.D. 160. His opinion rejecting petitioner's application for a patent in respect of its Mullins claims (JA 9-17) is not reported. The District Court wrote no opinion. The opinion of the Court of Appeals (Appendix A, *infra*, pp. A1-A8) is reported at 315 F. 2d 37.

JURISDICTION

The judgment of the court below (Appendix B(1), *infra*, p. A8) was entered on February 14, 1963. A timely petition for rehearing was denied on March 26, 1963 (Appendix B(2), *infra*, p. A9). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior had administrative power to cancel a valid, perfected mining claim for alleged subsequent abandonment; or, alternatively phrased with reference to the circumstances of this case, whether a valid, perfected mining claim, which constitutes property in the fullest sense of that term, can be wiped out and destroyed simply by failure to reply to a letter written by the Secretary of the Interior.

STATUTES INVOLVED

The statutes involved are set out in Appendix C, *infra*, pp. A9-A12.

STATEMENT

Inasmuch as only a single one of the issues passed on by the court below is now pressed, the facts giving rise to the present controversy, which are not in dispute, may be stated as follows:

Petitioner Gabbs Exploration Company, an existing Nevada corporation (JA 47) with its principal place of business in Utah, hereinafter "Gabbs," brought this action against Stewart L. Udall, Secretary of the Interior, herein-

after "the Secretary," to review, by an action for a declaratory judgment and for relief in the nature of mandamus, decisions of his predecessor in respect of two groups of unpatented oil shale placer claims, the first known as the Mullins claims, the second as the Sibbald-Coral claims. Each group was made the subject of a separate cause of action.

A. The Mullins Claims.

In 1918, Gabbs' predecessors in title located eight oil shale placer claims in Rio Blanco County, Colorado, known as Mullins Nos. 9 through 12, inclusive, and as Mullins Nos. 25 through 28, inclusive (Cmplt. ¶5, JA 2-3; Ans. ¶IV, JA 40). These will be referred to hereafter as the Mullins claims.

In March 1929, the then Secretary of the Interior, through his subordinates, caused a contest to be instituted against the record owners of the Mullins claims, in which it was alleged, insofar as here material,

> "2. That there has not been expended upon each and every one of the claims labor and improvements of a reasonable value of $100 for the assessment years ending July 1, 1921, to July 1, 1928, inclusive, and the claims have been abandoned." (Cmplt. ¶6, JA 3; Ans. ¶IV, JA 40.)

In April 1929, the record owners of the Mullins claims were served copies of the contest notice. About a month later the Register of the Denver Land Office advised the Commissioner of the General Land Office that the contestees had failed to file an answer within the time allowed by the regulations of the Department of the Interior governing contests, and accordingly recommended cancellation of the claims. Thereafter, on June 5, 1929, the Commissioner of the General Land Office, with the approval of the then Secretary of the Interior, declared the Mullins oil shale locations null and void, and directed the Register

to notify the contestees accordingly. (Cmplt. ¶7, JA 3; Ans. ¶IV, JA 40.)

The foregoing contest has never been entered on the tract books in the Denver, Colorado, Land Office relating to the lands on which the Mullins claims were located (Stip. ¶2, JA 56), although it was contemporaneously entered on the appropriate tract books in the General Land Office in Washington (Stip. ¶1, JA 56).

Subsequent to the date of the foregoing contest, this Court held that a charge of failure to perform assessment work would not serve as a basis for declaring unpatented mining claims null and void. *Wilbur* v. *Krushnic*, 280 U.S. 306 (January 6, 1930); *Ickes* v. *Development Corp.*, 295 U.S. 639 (June 3, 1935).

Following numerous mesne conveyances, duly set forth in the record, Gabbs on April 14, 1956, by quitclaim deed purchased the Mullins claims (Cmplt. ¶10, JA 4; Ans. ¶VI, JA 40-41; Stewart affi. ¶¶ 6, 7, JA 45-46).

Thereafter, in October 1956 and May 1957, Gabbs applied for patents on all of the Mullins claims, submitting in connection therewith all of the supporting documents and proofs required by 30 U.S.C. §29 and by 43 CFR, Part 185 (Cmplt. ¶11, JA 4; Ans. ¶VII, JA 41; Stewart affi. ¶8, JA 46).

In August 1958, however, the Manager of the Colorado Land Office rejected Gabbs' applications for patents on the ground that the Mullins claims had theretofore been declared null and void. On appeal, this decision was affirmed by the Director of the Bureau of Land Management in June 1959. On further appeal, the Director's decision was affirmed by the Deputy Solicitor as the duly authorized delegate of the then Secretary of the Interior on May 24, 1960, and a petition for reconsideration was denied on July 11, 1960. (Cmplt. ¶12, JA 4-5; Ans. ¶VIII, JA 41.) The decisions at the Secretarial level are duly

set forth in the record; they extend over more than 8 pages of the joint appendix (JA 9-17).

Some of the lands on which the Mullins claims were located were thereafter patented to third parties with a reservation of minerals in the United States, and oil and gas leases have since been executed covering some of the lands on which the Mullins claims were located (JA 12-13).

It is common ground between the parties that Gabbs had exhausted all of its administrative remedies within the Department of the Interior in respect of the Mullins claims prior to seeking relief in the courts (Cmplt. ¶14, JA 5; Ans. ¶X, JA 41).

B. The Sibbald-Coral Claims.

In 1917 and 1918, Gabbs' predecessor in title located 18 oil shale placer claims in Garfield County, Colorado, known as Sibbald Nos. 1 through 12, inclusive, and Coral Nos. 3 through 8, inclusive (Cmplt. ¶15, JA 5; Ans. ¶XI, JA 41). These will be referred to hereafter as the Sibbald-Coral claims.

In December 1929, the then Secretary of the Interior, through his subordinates, caused a contest to be instituted against the record owner of the Sibbald-Coral claims, in which it was alleged:

> "1. That there has been no assessment work performed upon any of the above described placer mining claims for the assessment years ending July 1, 1921, up to and including July 1, 1929.
>
> "2. That each and every one of said claims has been abandoned." (Cmplt. ¶16; JA 5; Ans. ¶XI, JA 41.)

In January 1930, the record owner of the Sibbald-Coral claims was served a copy of the contest notice. In April 1930 the Register of the Denver Land Office advised the Commissioner of the General Land Office that the contestee had failed to file an answer within the time allowed by the

regulations of the Department of the Interior governing contests, and accordingly recommended cancellation of the claims. Thereafter, on May 19, 1930, the Commissioner of the General Land Office, with the approval of the then Secretary of the Interior, declared the Sibbald-Coral oil shale locations null and void, and directed the Register to notify the contestee accordingly (Cmplt. ¶17, JA 6; Ans. ¶XI, JA 41).

The foregoing contest was contemporaneously entered on the appropriate tract books in the General Land Office at Washington, D. C. (Stip. ¶3, JA 56), but it was not so entered in the tract books of the Land Office at Denver, Colorado (Stip. ¶4, JA 57). There is evidence in the record showing that the Sibbald-Coral contest was not entered in the Denver Land Office tract books until February 13, 1961, three weeks after the present action was brought (Evans Affi. ¶¶3-4, 6-7, JA 48-50; Exhs. to Evans Affi., JA 51-53).

Meanwhile, as has been noted (*supra*, p. 4), this Court held that charge of failure to perform assessment work would not serve as a basis for declaring unpatented mining claims null and void.

Thereafter, on March 21, 1956, Gabbs by quitclaim deed purchased the Sibbald-Coral mining claims (Cmplt. ¶19, JA 6; Ans. ¶XIII, JA 41-42).

Subsequently, in August 1956, Gabbs applied for patents on all of the Sibbald-Coral claims, submitting in connection therewith all of the supporting documents and proofs required by 30 U.S.C. §29 and by 43 CFR, Part 185 (Cmplt. ¶20, JA 6-7; Ans. ¶XIV, JA 42). These claims were inspected and approved for further processing, and publication pursuant to the application was duly made and completed (Stewart affi. ¶ 4 and Ex. B thereto, JA 45, 47). Final proof on the claims was submitted in August 1957, purchase money in the sum of $7,200 was paid, and a

receipt issued to Gabbs therefor (Stewart affi. ¶ 5 and Ex. C thereto, JA 45, 47).

In February 1958, however, the Manager of the Colorado Land Office rejected Gabbs' applications for patents on the ground that the Sibbald-Coral claims had theretofore been declared null and void. On appeal, this decision was affirmed by the Director of the Bureau of Land Management in April 1959. On further appeal, the Director's decision was affirmed by the Deputy Solicitor as the duly authorized delegate of the then Secretary of the Interior on April 25, 1960, and a petition for reconsideration was denied on June 10, 1960. (Cmplt. ¶21, JA 7; Ans. ¶XV, JA 42.) The decisions at the Secretarial level are duly set forth in the record; they extend over nearly 22 pages of the joint appendix (JA 17-38) and are reported at 67 I. D. 160.

Oil and gas leases have since been executed covering the lands on which the Sibbald-Coral claims were located (JA 33, 43). Part of those lands were later conveyed to one Burton McKee (JA 33-34, 43). The parties are now agreed that this patent contained a reservation of minerals to the United States (Stip. ¶5, JA 57), although the Secretary's decision does not disclose that circumstance (JA 33-34).

With respect to the Sibbald-Coral claims also, the parties agree that Gabbs had exhausted all of its administrative remedies within the Department of the Interior before seeking judicial review (Cmplt. ¶23, JA 7; Ans. ¶XVII, JA 42).

C. The Present Proceeding.

Gabbs brought suit against the Secretary on January 23, 1961, praying (1) for a judgment declaring that the Mullins and Sibbald-Coral contests were severally invalid; (2) for a judgment that the decisions of the Secretary's predecessor cancelling the Mullins and Sibbald-Coral

mineral claims were severally null and void; (3) for a judgment enjoining the Secretary from rejecting Gabbs' applications for patents to the Mullins and Sibbald-Coral claims on the basis of the foregoing contests and decisions; and (4) for a judgment directing the Secreary to determine Gabbs' right to the patents in question without regard to those contests and decisions (JA 1-8).

Both parties moved for summary judgment, supplementing the pleadings with affidavits and documents (JA 44-53). Those motions were heard on September 22, 1961 (JA 1). Over two months later, the District Court (Matthews, J.) announced its decision, granting the Secretary's motion and denying Gabbs', without however writing any opinion or otherwise explaining the result (JA 55).

On appeal (JA [illegible]56), the court below held, with respect to the issue now presented, that it was foreclosed by this Court's comment in *Ickes* v. *Development Corp.*, 295 U.S. 639, 645, that the Secretary had authority to cancel administratively a mining claim on the ground of abandonment (Appendix A, *infra*, at pp. A3-A5), and accordingly affirmed the judgment of dismissal (Appendix B(1), *infra*, p. A8). A timely petition for rehearing, which pointed out that the comment in question was dictum, since the pleadings in the *Development Corp.* case negatived any abandonment, and that the dictum was moreover without any support in the decisions, was denied (Appendix B(2), *infra*, p. A9).

REASONS FOR GRANTING THE WRIT

In this case the court below in effect abdicated its judicial function, following without the slightest effort at analysis an expression in an opinion here that was clearly *obiter*, an expression that was not supported either by the authorities there cited nor by any other, an expression that was moreover clearly at variance not only with a significant executive ruling (which the court below did not

cite, much less discuss, although the ruling had been strongly pressed upon it), but which was additionally inconsistent with the course of Congressional legislation on the subject.

The question that is now presented for authoritative resolution is particularly significant at this time for two reasons.

1. The issue here tendered is clouded by the crossfire of apparent inconsistencies in two closely related cases decided during the last Term.

The tenor of *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, would lead one to believe, on the one hand, that the power of the Secretary of the Interior over unpatented mining claims is unlimited, even where that officer institutes proceedings to condemn such claims, so that in effect he becomes judge in his own cause to adjudicate the value of what he is himself taking. That decision, as we point out below, failed to consider a vital statutory qualification to the Secretary's omnicompetence, one that is vital and indeed controlling here.

But *Boesche* v. *Udall*, No. 332, last Term, decided May 27, 1963, reaffirms the traditional view that there is a decisive difference of substance between the Secretary's power to cancel mineral leases or invalid mining claims, and his power over perfected and valid mining locations, such as are involved here; the latter convey an unencumbered estate in the minerals. The result reached below in the present case is therefore, in our view, utterly inconsistent with the limitations carefully delineated in the *Boesche* opinion.

But, at the very least, the desirability of resolving the apparently conflicting expressions in *Boesche* and *Humboldt Mining*, and the public interest in such clarification for the guidance of the land department and of the lower

courts, combine to demonstrate the need for review by this Court. This is particularly so at the present time, because, by reason of the enactment of 28 U.S.C. §1391(e), which now permits the Secretary to be sued wherever the plaintiff resides or wherever the land is located, the present question can arise in many other Circuits. It is therefore no longer one necessarily restricted to litigation brought in the District of Columbia.

2. The question of the Secretary's power to cancel valid mining claims for subsequent abandonment, the only issue now tendered, is presently involved in a host of proceedings currently pending at various stages within the Interior Department's lengthy administrative processes.

First. The mining claims here in issue—Mullins and Sibbald-Coral—were duly located in 1917 and 1918. There has never been any question whatever concerning their validity *ab initio:* the land was subject to location, it was mineral, and there was a sufficient discovery. The contrary has never even been so much as intimated. Consequently, these were valid mining claims, and as such they were property in the fullest sense of that term. As this Court said in *Wilbur* v. *Krushnic*, 280 U.S. 306, 316, only recently quoted with approval in *Boesche* v. *Udall*, *supra* (p. 6, note 7, of slip opinion):

> "The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property', subject to the lien of a judgment recovered against the owner in a state or territorial court."

We pause to answer three subsidiary questions that will undoubtedly occur at once to the reader.

1. The circumstance that mining claims now in question were for so many years never sought to be patented detracts nothing from their validity, as this Court long ago pointed out in *Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U.S. 220, 224:

> "The fact that many years have elapsed since the original location of the placer claim, and that no patent has yet been issued therefor, does not affect its validity, for it is a well-known fact, as stated by the court of appeals in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 112 Fed. Rep. 4, 16, that 'some of the richest mineral lands in the United States, which have been owned, occupied, and developed by individuals and corporations for many years, have never been patented.'"

Or, as phrased in *Wilbur* v. *Krushnic*, 280 U.S. 306, 317, quoted with approval in *Boesche* v. *Udall*, No. 332, last Term, *supra* (p. 6, note 7, of slip opinion):

> "The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent."

2. When the Colorado Land Office issued its receipt for the $7200 paid by Gabbs in respect of the Sibbald-Coral claims (Stewart affi. ¶5, and Ex. C thereto, JA 45, 47), it thereby adjudicated that Gabbs acquired an equitable title to those claims, and was entitled to a patent. See *El Paso Brick Co.* v. *McKnight*, 233 U.S. 250, 256-257:

> "In the present case the Brick Company's application for a patent was filed, each of the several forms of notice required by statute was given, no adverse claim was filed, the purchase price was paid to the government, and a final receipt was issued by the local land office. The entry by the local land officer issuing the final receipt was in the nature of a judgment *in rem*

(*Wight* v. *Dubois*, 21 Fed. 693), and determined that the Brick Company's original locations were valid, and that everything necessary to keep them in force, including the annual assessment work, had been done. It also adjudicated that no adverse claims existed and that the Brick Company was entitled to a patent."

3. The circumstances (*supra*, pp. 5, 7) that oil and gas leases have been executed on lands on which both sets of claims were located of course does not militate against Gabbs' rights in the slightest. As the court below pointed out only recently (*Union Oil Co.* v. *Udall*, 289 F. 2d 790, 791, note 1), if the underlying mining claim is valid, no mineral lease can validly issue on the same land. Moreover, the Secretary of the Interior had earlier ruled that, when a mining location comes to light, such a location is so far property that it becomes his duty to cancel subsequent oil and gas leases (*Jensen et al., Keith et al.*, 63 I.D. 71, 74; *J.C. Nelson et al.*, 64 I.D. 103, 105), and that, in such a situation, he has no authority to refund the rentals already paid on the oil and gas leases thus cancelled (*L.N. Hagood et al.*, 65 I.D. 405). The Secretary's power of cancellation in those circumstances, see *Boesche* v. *Udall*, No. 332, last Term, *supra*, must now be deemed settled beyond dispute.

To summarize, then, a valid mining claim is property in every sense of that term, it need not be patented as a condition of subsequent validity, the passage of an equitable title and entitlement to a patent are adjudicated once the purchase price is paid and a receipt issued, and land covered by valid mining claims cannot be validly leased by the Secretary to third parties.

Second. As has been stated, the Secretary in 1929 and 1939 contested both groups of mining claims here involved on two grounds, (1) failure to perform annual assessment work, and (2) abandonment. Under this Court's decisions in *Wilbur* v. *Krushnic*, 280 U.S. 306, and *Ickes* v. *Development Corp.*, 295 U.S. 639, construing R.S. §2324; 30 U.S.C. §28, *infra*, pp. A9-A10, the first ground was admittedly in-

sufficient, and the rulings below did not rely upon it at any level. The validity of the second ground poses the single question now presented.

Petitioner's predecessors in title did not respond to the contest notices, and their entries were cancelled by default. It is for that reason that we formulate the question alternatively as "whether a valid, perfected mining claim, which constitutes property in the fullest sense of that term, can be wiped out and destroyed simply by a failure to reply to a letter written by the Secretary of the Interior."

Resolution of that question depends on whether what this Court said in the *Development Corp.* case was decision or dictum, and, if the latter, whether it has support in the authorities. (295 U.S. at 645):

> "There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. *Cameron* v. *United States*, 252 U.S. 450, 460; *Cole* v. *Ralph*, 252 U.S. 286, 296; *Black* v. *Elkhorn Min. Co.*, 163 U.S. 445, 450; *Brown* v. *Gurney*, 201 U.S. 184, 192; *Farrell* v. *Lockhart*, 210 U.S. 142, 147."

In respect of abandonment, the foregoing assertion was plainly dictum, because, as both the opinion and record plainly show, there was no abandonment issue in that case. See 295 U.S. at 646:

> "There is no ground for a charge of abandonment. The allegations of the bill [¶¶ 4 and 6, R. 1-2, No. 23, Oct. T. 1934], admitted by the motion to dismiss, dispose of any such contention."

That being so, anything said in the opinion concerning abandonment was, on basic first principles, necessarily *obiter*. We must therefore confess ourselves quite unable to understand, much less accept, the statement in the opinion below (*infra*, p. A4) that "the quoted language was in fact material to the decision."

Third. Moreover, the quoted dictum that the Secretary could cancel for subsequent abandonment mining claims that were originally valid was quite without support in the authorities cited, and—except for the ruling now sought to be reviewed—without support anywhere else.

By way of preliminary, however, a vital distinction must be kept in mind.

One. The Secretary has undoubted power in a proceeding seeking the issuance of a patent to determine the validity of a mining claim, to adjudicate whether the claimant has a valid right as against the United States, i.e., whether he has obtained property from the United States. Cf. *Best* v. *Humboldt Mining Co.*, 371 U.S. 334. Thus, the Secretary can determine whether the claim is mineral, whether there has been discovery, whether the claim is so tainted by fraud as to preclude any right from arising. But here we are dealing with his power to defeat valid, perfected and existing claims by reason of later matters, his power to declare property destroyed and to revoke the grant (*Wilbur* v. *Krushnic; Boesche* v. *Udall*, quoted *supra* p. 10) by reason of events subsequent to the original location and perfecting of the claim.

Two. While the Secretary has power to determine whether a claimant has a valid mining right as against the United States, for many years, and during all of the periods here in question, he never had power to adjudicate administratively between adverse mining claimants. Such contests were, by the express terms of the statute (R.S. §2326; 30 U.S.C. §30; *infra*, pp. A11-A12), remitted to the civil courts. This limitation was not mentioned in *Best* v. *Humboldt Mining Co.*, 371 U.S. 334; indeed, the cited statute seems not to have been discussed in the briefs. But virtually all of the judicial decisions turning on abandonment arose in just such judicial contests, outside the administrative proceedings.

Accordingly, with the foregoing fundamental distinction in view, we turn to the five cases cited by this Court in its *Development Corp.* dictum, 295 U.S. at 645:

(a) The first case cited, *Cameron* v. *United States*, 252 U.S. 450, was an action in ejectment brought in a United States District Court following an administrative determination by the Secretary that Cameron's claim was invalid *ab initio* for lack of discovery. The *Cameron* case did not involve abandonment, much less did it involve any question of the Secretary's power to proceed administratively on the ground of subsequent abandonment against a mining claim valid when located.

We do not question the proposition, laid down in the *Cameron* case and specifically reaffirmed in *Boesche* v. *Udall*, No. 332, last Term, *supra*, pp. 4-6 of slip opinion, that if the power exists it is vested "in the land department," i.e., in the Secretary of the Interior. We do assert that, whatever the Secretary's power in respect of an invalid mining claim, such as was involved in *Cameron*, or in respect of a mineral lease, which as this Court only the other day said "does not give the fessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals" (*Boesche* v. *Udall*, *supra*, p. 6 of slip opinion, quoting the passages from *Wilbur* v. *Krushnic* already set forth herein at pp. 10 and 11, *supra*), the Secretary has no power to wipe out administratively the property in valid, perfected mining locations such as were involved here. Neither does any other administrative or executive officer have such power.

(b) All of the other four cases cited by this Court in its *Development Corp.* decision were judicial contests between adverse claimants brought in the civil courts pursuant to R.S. § 2326; 30 U.S.C. § 30; *infra* pp. A11-A12. Not a single one of those four involved an administrative proceeding brought by the Secretary.

It follows that not a single one of the cases cited in support of the *Development Corp.* dictum lends the slightest support to the proposition that the Secretary of the Interior may, on the ground of a subsequent abandonment, administratively cancel hitherto valid, perfected mining claims and adjudicate the loss of the property therein.

Fourth. Not only is there no judicial decision, other than the one now sought to be reviewed, which supports the *Development Corp.* dictum, but executive and legislative expressions join in demonstrating the unsoundness of that expression.

1. A reasoned Solicitor's Opinion, duly published in *Interior Decisions*, written by Judge Edward C. Finney, a master of land law,[2] stresses the difference between the Secretary's power to determine the validity of mining claims originally and his lack of power to cancel or even to adjudicate conclusively the subsequent abandonment of a mining claim originally valid, and hence to declare destroyed the property therein. See *Challenge to Validity of Mining Claims in National Parks*, 53 I.D. 491, 494, 495:

> "With regard to the propriety of bringing proceedings against mining locations in the national parks on a charge of abandonment, certain settled principles of law should be premised. They are: (1) That abandonment is a question of intent and, necessarily, if not evidenced by some unequivocal positive acts, is more difficult to prove than mere omission to perform legal requirements of work and improvement, which leave tangible evidence of their performance, and (2) That lapse of time, absence from the ground, or failure to work the claim for any definite period, unaccom-

[2] His service in the Office of the Assistant Attorney General for the Interior Department, later Office of the Solicitor, commenced in 1908 or 1909, see flyleaf in 37 L.D. From 1915 or 1916 until 1921, he was a member of the Board of Appeals in that office (44-47 L.D.). Thereafter he was First Assistant Secretary of the Interior from 1921 to 1929, and Solicitor of the Department from 1929 to 1933. See his paper on *The Board of Appeals, Department of the Interior*, 10 Am. Pol. Sci. Rev. 290 (1916).

panied by other circumstances, are not evidence of abandonment. Lindley on Mines, Sec. 644 and cases cited. The last-stated rule would have all the more force as to locations within the parks, where, under the present state of the law—unfortunately detrimental to the National Park Service—the mining claimant's possessory rights are not placed in jeopardy of statutory forfeiture by his delinquencies in failing to work his claim, and from such delinquency indifference could not be inferred as to what became of his rights.

* * * * *

"The * * * statement to the effect that if a claim in fact is abandoned, a departmental declaration to that effect hardly adds weight to the actual fact would seem to imply that it would not have the conclusiveness in legal effect that a departmental decision would have adjudging a claim void because the land was nonmineral or that a discovery thereon had not been made. For a decision on the grounds last mentioned 'is efficient and sufficient to extinguish absolutely, and forever, all force and effect said location presumably ever had, and to destroy such location and all evidence thereof for any purpose.' *Cameron* v. *Bass* (19 Ariz. 246; 168 Pac. 645, 648). And obviously, if the decision of the department holding a claim abandoned had like legal effect, it would be an advantage to the Government to adjudge a claim abandoned and thereby shut out any possibility of claim of validity thereafter.

* * * * *

"There is, also, another fact to consider; that is, that a question of abandonment does not present the question of validity or invalidity of a location *ab initio*, but implies that it was valid, for rights can not be abandoned that never existed. There is room, therefore, for considerable doubt as to the conclusiveness of a departmental finding that a mining location was abandoned."

The foregoing Solicitor's Opinion, it is proper to note, was simply brushed aside in the administrative rulings herein (JA 34-35), and the opinion now sought to be reviewed passes it by in silence, although it was heavily re-

lied on by petitioner in all of the three briefs it filed in the court below before argument there.

This Court's decisions over many years reflect what has twice been reasserted at the last Term (*Best* v. *Humboldt Mining Co.*, 371 U.S. 334; *Boesche* v. *Udall*, No. 332, *supra*), the view that administrative rulings by the land department are entitled to weighty respect by the courts. We urge here the other side of the coin, the proposition that such rulings are also entitled to respect within the land department and are not to be brushed aside by the Secretary's delegates whenever—and simply because—adherence thereto would result in granting to a claimant what it seeks.

2. The course of legislation, also, reflects an awareness of the Secretary's lack of power to cancel valid mining claims on a charge of subsequent abandonment. To begin with, a mining claim is recorded only in county records without knowledge of the Interior Department, it is indexed only by the name of the claimant and the name of the claim, and it could validly be located on unsurveyed lands and described only with reference to natural monuments. See Due, *Multiple Mineral Development Problems—Public Law 585 in Retrospect*, 31 Rocky Mountain L. Rev. 269, 271-273. Many such claims were abandoned in fact, but their existence interfered with development of the land. If, therefore, the Secretary of the Interior had power to dispose of such claims administratively, and thus to avoid conflicts with subsequent leases, compare the Departmental rulings cited at p. 12 above, it is hardly likely that he would have failed to do so. In fact, he did not act, and it required additional legislation in 1954 to give him the power to clear up inactive mining claims that the court below ruled he already had. Sec. 7 of the Act of Aug. 13, 1954, c. 739, 68 Stat. 708, 711, 30 U.S.C. § 527.

The Committee Reports on the cited legislation show that Congress was concerned over "the title uncertainties which follow from the possible existence of unidentifiable mining

locations and from the uncertain status of old and inactive locations" (Sen. Rep. 1610, 83rd Cong., 2d sess., p. 4; H.R. Rep. 2028, 83rd Cong., 2d sess., pp. 9-10). No doubt the 83rd Congress would have been vastly surprised to learn that the scheme for quieting title it was then enacting was quite unnecessary, that the Secretary even in the absence of this additional legislation already had ample power to cancel inactive and dormant mining locations administratively.

The net of the foregoing is that both the Solicitor's Opinion in 1931 as well as the Act of Congress in 1954 join in demonstrating the patent incorrectness as well as the unsettling effect of the ruling below.

Fifth. Lest our silence on the point be misconstrued, we deem it appropriate to point out, in answer to what was said below (*infra*, p. A8)—"Further, nowhere does plaintiff offer any facts showing that its predecessors in interest had *not* abandoned the claims in 1929"—that opportunity to make such a showing was specifically denied petitioner by the Secretary (JA 37-38).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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